Supreme Court, U.S.
FILED

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NO.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

RONALD BELL, FRANK AROSTEGUI, RICHARD McLEAN, ROBERT THOMAS, ROBERT FAIR, JOHN HICKEY, KENNETH A. LEIBNITZER, GEORGE MEYER, EDWARD J. KING, ORLANDO PAREDES, and ROBERT L. DAUGHERTY,

Petitioners,

vs.

CITY OF MIAMI,

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

RICHARD A. SICKING, ESQUIRE
Attorney for Petitioners
2700 S. W. Third Avenue
Suite 1E
Miami, Florida 33129
(305) 858-9181

SUPREME COURT OF FLORIDA

MONDAY, APRIL 11, 1994

CITY OF MIAMI,	*	CASE NO. 80,524
	*	
Petitioner,	*	District Court of Appeal
	*	1st District - No. 91-1878
v.	*	
	*	
Ronald V. Bell,	*	
	*	
Respondent.	*	
	*	
**********		
CITY OF MIAMI,	*	CASE NO. 80,560
	*	
Petitioner,	*	District Court of Appeal
	*	1st District - No. 91-675
v.	*	
	*	
Frank Arostegui,	*	
	*	
Respondent.	*	
	*	
**********		
CITY OF MIAMI,	*	CASE NO. 80,575
	*	
Petitioner,	*	District Court of Appeal
	*	1st District - No. 91-2155
v.	*	
	*	
Richard McLean,	*	
	*	
Respondent.	*	
	*	
**********		

APPENDIX A

CITY OF MIAMI,	*	CASE NO. 80,652
	*	
Petitioner,	*	District Court of Appeal
	*	1st District - No. 91-1297
v.	*	
	*	
George A. Meyer,	*	
	*	
Respondent.	*	
	*	
**********		
CITY OF MIAMI,	*	CASE NO. 80,683
	*	
Petitioner,	*	District Court of Appeal
	*	1st District - No. 91-1734
v.	*	
	*	
Robert Thomas,	*	
	*	
Respondent.	*	
	*	
**********		
CITY OF MIAMI,	*	CASE NO. 80,728
	*	
Petitioner,	*	District Court of Appeal
	*	1st District - No. 91-1334
v.	*	
	*	
Robert Fair,	*	
	*	
Respondent.	*	
	*	
**********		

CITY OF MIAMI,	*	CASE NO. 80,981
	*	
Petitioner,	*	District Court of Appeal
	*	1st District - No. 91-4025
v.	*	
	*	
John Hickey,	*	
	*	
Respondent.	*	
	*	
**********		
CITY OF MIAMI,	*	CASE NO. 80,998
	*	
Petitioner,	*	District Court of Appeal
	*	1st District - No. 92-1595
v.	*	
	*	
Kenneth A. Leibnitzer,	*	
	*	
Respondent.	*	
	*	
**********		
CITY OF MIAMI,	*	CASE NO. 80,999
	*	
Petitioner,	*	District Court of Appeal
	*	1st District - No. 92-1594
v.	*	
	*	
Edward J. King,	*	
	*	
Respondent.	*	
	*	
**********		

CITY OF MIAMI,	*	CASE NO. 81,340
	*	
Petitioner,	*	District Court of Appeal
	*	1st District - No. 91-4150
v.	*	
	*	
Orlando Paredes,	*	
	*	
Respondent.	*	
	*	
**********		
CITY OF MIAMI,	*	CASE NO. 81,554
	*	
Petitioner,	*	District Court of Appeal
	*	1st District - No. 92-1593
v.	*	
	*	
Robert L. Daugherty,	*	
	*	
Respondent.	*	
	*	
**********		

Respondents' Motion for Rehearing or Clarification filed in the above causes is hereby denied.

All Motions for Attorneys Fees filed in the above causes are hereby denied.

OVERTON, McDONALD, SHAW, GRIMES, KOGAN and HARDING, JJ., concur
BARKETT, C.J., recused

TC

cc: Hon. Jon S. Wheeler, Clerk
Ms. Cecilia F. Renn
Mr. A. Quinn Jones, III
Ms. Kathryn S. Pecko
Mr. Arthur J. England, Jr.
Mr. Charles M. Auslander
Mr. Richard A. Sicking
Mr. Mark L. Zientz
Mr. Paul J. Kneski

A True Copy

TEST:

By:
Deputy Clerk

Sid J. White
Clerk, Supreme Ct.

SUPREME COURT OF FLORIDA

CITY OF MIAMI, Petitioner,
vs. Case No. 80,524
RONALD BELL, Respondent.

CITY OF MIAMI, Petitioner,
vs. Case No. 80,560
FRANK AROSTEGUI, Respondent.

CITY OF MIAMI, Petitioner,
vs. Case No. 80,575
RICHARD McLEAN, Respondent.

CITY OF MIAMI, Petitioner,
vs. Case No. 80,652
GEORGE A. MEYER, Respondent.

CITY OF MIAMI, Petitioner,
vs. Case No. 80,683
ROBERT THOMAS, Respondent.

CITY OF MIAMI, Petitioner,
vs. Case No. 80,728
ROBERT FAIR, Respondent.

CITY OF MIAMI, Petitioner,
vs. Case No. 80,981
JOHN HICKEY, Respondent.

APPENDIX B

CITY OF MIAMI, Petitioner,
vs. Case No. 80,998
KENNETH A. LEIBNITZER, Respondent.

CITY OF MIAMI, Petitioner,
vs. Case No. 80,999
EDWARD J. KING, Respondent.

CITY OF MIAMI, Petitioner,
vs. Case No. 81,340
ORLANDO PAREDES, Respondent.

CITY OF MIAMI, Petitioner,
vs. Case No. 81,554
ROBERT L. DAUGHERTY, Respondent.

MOTION FOR REHEARING OR CLARIFICATION

COME NOW the Respondents, by and through their undersigned attorneys, and file this motion for rehearing or clarification and for grounds would state:

This motion is filed pursuant to Fla. R. App. P. 9.330(a).

In the Court's Order, the Court stated the issue:

> We must now decide whether *Barragan* is to be applied

prospectively only. (Opinion at page 4).

The Court held that *Barragan v. City of Miami*, 545 So. 2d 252 (Fla. 1989) was to have no effect on the amount of disability payments owed by the City except for those payments accruing after the effective date of the *Barragan* decision. The Court explained its reasoning for so holding:

> The City's budgeting for salary and benefits as well as its allocation of tax resources was made in reliance on the ordinance and existing caselaw. Holding the City liable for past offsets would require a reallocation of municipal services and subject today's taxpayers to yesterday's fiscal obligations.
>
> The City's contracts with its employees recognized the City's right to an offset. To now hold the City liable for past offsets would effectively modify completed contracts without affording the City an opportunity to renegotiate the other terms of those contracts, such as salaries and benefits. When contractual rights are adversely affected in such a manner, we are reluctant to apply a decision retroactively. *Florida Forest & Park Service v. Strickland*, 154 Fla.

> 472, 18 So. 2d 251 (1944). We note that our rulings in *Martinez v. Scanlan*, 582 So. 2d 1167 (Fla. 1991), and *National Distributing Co. v. Office of Comptroller*, 523 So. 2d 156 (Fla. 1988), were prospective only.
>
> To the extent the offset was taken prior to *Barragan*, City employees have received what their contracts called for when their rights vested. Present and future benefits required by *Barragan* can be adjusted without serious financial consequence for City taxpayers; but to require back benefits for prior years would be fiscally unjust to the taxpayers of the City of Miami. (Opinion at page 5).

In so reasoning, the Court may have overlooked that the employee's right to receive his pension is a vested property right which cannot be taken from him. In the Florida Protection of Public Employee Retirement Benefits Act, §112.66(2), Fla. Stat. the Florida Legislature refers to "vested pension benefits". In *Florida Sheriffs Association v. Department of Administration, Division of Retirement*, 408 So. 2d 1033 (Fla. 1981), the Supreme Court of

Florida discussed voluntary versus mandatory governmental retirement plans, contributory versus non-contributory retirement plans, and the interest of active employees versus retired employees in terms of the constitutional prohibition against laws which impair the obligation of contracts.[1] The Court held that retired employees have a vested property right in their pensions. Id., at 1036.

In 1973, the Legislature passed Laws of Florida, Ch. 73-127, repealing §440.09(4), Fla. Stat. This clearly expressed the Legislature's intent that offsets for workers' compensation that were permitted prior to repeal were no longer to be allowed. Therefore, when each of the Respondents was injured after July 1, 1973,[2] they had a vested property right that their pensions should be paid according to law. See

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[1] The Respondents are retired members of a mandatory, contributory plan.

[2] The applicable Workers' Compensation Law is the statute in force on the date of the accident. *Sullivan v. Mayo*, 121 So. 2d 424 (Fla. 1960).

Florida Sheriffs Assoc. v. Department of Admin., supra.

Since this Court held in *Barragan* that the offset in the City's pension ordinance was unlawful under state law, and since the City admits that it was unlawful by paying without offset since August 1, 1989, the Court's holding in this case allows the City to do that which is admittedly unlawful, but for a period of time. Part of the rationale for this extraordinary privilege (in the face of the employee's vested property right to their pensions) is this Court's statement:

> The City's contracts with its employees recognized the City's right to an offset. (Opinion at page 5).

The Court may have overlooked that this statement has no basis in fact or in law. The record in *City of Miami v. Bell* does not contain a copy of the union contract. The record in *City of Miami v. Arostegui* does not contain the union contract. The record

in *City of Miami v. Meyer* does not contain the union contract. The record in *City of Miami v. Fair* does not contain the union contract. The record in *City of Miami v. Hickey* does not contain the union contract. The record in *City of Miami v. Leibnitzer* does not contain the union contract. The record in *City of Miami v. King* does not contain the union contract. The record in *City of Miami v. Paredes* does not contain the union contract. The record in *City of Miami v. Daugherty* does not contain the union contract.

Therefore, the Court may have overlooked that it would be inappropriate for the Court to make a finding of fact as to what the parties had agreed to when any such contract is not in the record. Certainly the Respondents would not have received due process of law in such a case. The City, not having raised such a defense at the trial level, did not introduce as evidence any

contract in its defense. This was not argued in the Court below. It would be fundamentally unfair for the City to make such an argument for the first time before this Court. This denies to the Respondents due process of law because they have not been afforded the opportunity to prove that there was no such contract, or that they did not agree to the City's right to an offset, or that neither they nor the union could have done so. The Court may have overlooked that the statement in the Court's opinion: "The City's contracts with its employees recognized the City's right to an offset", has no basis in the record with respect to these Respondents.

The record in *City of Miami v. Thomas* does contain the union contract between the City and the Fraternal Order of Police for the period of time October 1, 1976, to September 30, 1978. Article XXIX provides that the pension ordinance will continue for

the life of the agreement. (R. Thomas 236). However, the next article, Article XXX, is entitled "Provisions in Conflict with Law". It provides that if any court of competent jurisdiction subsequently determines that any of the words of the agreement are in conflict with any law, that the words in conflict "shall be null and void and subject to renegotiation, but the remainder of the Agreement shall remain in full force and effect with it being presumed that the intent of the parties herein was to enter into the Agreement without such invalid portion or portions". (R. Thomas 236). This has the effect of voiding from the agreement the offset provision in the pension ordinance which was held to be invalid in *Barragan*. The City agreed that if this occurred, that it could <u>not</u> renegotiate any other provision of the contract and that the offending words were severable. However, in the *Bell* opinion, this Court wrote:

> The City's contracts with its employees recognized the City's right to an offset. To now hold the City liable for past offsets would effectively modify completed contracts without affording the City an opportunity to renegotiate the other terms of those contracts, such as salaries and benefits. (Opinion at page 5).

The Court may have overlooked that in saying that to hold the City liable for past offsets would effectively modify completed contracts without affording the City an opportunity to renegotiate the other terms of those contracts such as salaries and benefits IS EXACTLY WHAT THE CITY AGREED TO IN THE *THOMAS* CONTRACT. The City agreed that if this occurred, it would not be able to renegotiate the other terms of the contract, such as salaries and benefits. The City agreed in Article XXX that it could not renegotiate any other provision of the Agreement if any words were subsequently nullified on account of

conflict with state statute. The Court may have overlooked that the Court's holding in the *Bell* case is exactly the opposite of what the City agreed to in the *Thomas* contract.

The record in *City of Miami v. McLean* does contain the union contract between the Sanitation Employees Association and the City for the period 1977 to 1979. It does not contain an article with reference to pensions at all, but it did contain a prevailing benefits clause, which could be construed to include pension benefits in a general way. However, it does contain Article XXVIII entitled "Provisions in Conflict With Law". It provides:

> Section 1. If this agreement or any provision, section, subsection, sentence, clause, phrase, or word of this agreement, is in conflict with any existing State or Federal law, or future State or Federal law; or with any existing City ordinance, including, but not limited to, Ordinance No. 6945 (Civil Service Rules and Regulations) or Resolution; or with any interpretation of this agreement

> made by a court of competent jurisdiction, that portion of this agreement in conflict with said law or ordinance or resolution, or court interpretation of law, shall be null and void; but the remainder of the Agreement shall remain in full force and effect with it being presumed that the intent of the parties herein was to enter into the Agreement without such invalid portion or portions. (R. McLean 176-177).

The difference between the 1976/1978 FOP contract in *Thomas* and the 1977/1979 SEA contract in *McLean* is that in *Thomas*, the offending words could be renegotiated, but no other provisions could be renegotiated; whereas in *McLean*, neither the offending words nor any other provisions could be renegotiated. Thus the Court may have overlooked in saying that by requiring the City to pay for the pension offsets which were illegal under *Barragan*, "...would effectively modify completed contracts without affording the City an opportunity to renegotiate the other terms of

those contracts, such as salaries and benefits" (Opinion at page 5) ----that this was precisely what the City agreed to.

The City could not argue that making it liable for past offsets would effectively modify completed contracts without affording the City an opportunity to renegotiate the other terms of those contracts, such as salaries and benefits. The City could not make that argument because it would be false and overreaching. The Court may have overlooked that it assumed what the parties had agreed to, which is not what the parties agreed to. More importantly, the reference to contracts is inappropriate under the terms of the Court's own opinion which recognizes that any agreement for pension offsets was illegal and null and void.

However, this statement by the Court, apart from having no basis in fact in the record, is of great harm and mischief. This

Court held in *Barragan* that the offset provision in the City of Miami's disability ordinance, while unlawful after 1973 by virtue of the repeal of §440.09(4), Fla. Stat., was also unlawful because it violated §440.21(1), Fla. Stat., which made it a crime for the employer to pay workers' compensation from a fund to which the employee contributed. *Barragan*, supra, at 253-254.

This Court quoted this statute in the *Bell* case, and further quoted the next subsection, which is §440.21(2), Fla. Stat.: "No agreement by an employee to waive his right to compensation under this chapter shall be valid". (Opinion at page 2, footnote 1).

This statutory quote is contained in footnote 1 on page 2 of the opinion. In the second paragraph on page 5, the Court explains its reasoning that the City would be permitted to offset for the period of time from 1973 to 1989 because:

> The City's contracts with its employees recognized the City's right to an offset. (Opinion at page 5).

Yet the Court had previously stated in the footnote on page 2 in citing §440.21(2), Fla. Stat., that "No agreement by an employee to waive his right to compensation under this chapter shall be valid".

To anyone who reads the opinion, the statement on page 5 that the parties had contracted for the offset when compared with the citation to the statute on page 2 of the opinion, that such agreements are illegal, would become greatly confused by the decision. The decision gives effect to an illegal agreement, which the decision recognizes to be illegal. The decision explains that a reason for the holding is that the employee agreed to the illegality, even though the statute provides that his agreement is void. In this particular case, the Court approves of an agreement, which

is an agreement by the employee to have a crime committed against him. The criminal violation referred to in the opinion is the violation of §440.21(1), Fla. Stat. *Barragan v. City of Miami*, supra, at 253-254.

While the Court's opinion is vague as to which "contracts with its employees" the Court is referring to, the only contracts that are in the record are those in the *Thomas* and *McLean* cases, which only cover policemen for the years 1976 to 1978 and sanitation workers for the years 1977 to 1979. Nonetheless, having shown that an agreement by the employee himself to such agreement is void under §440.21(2), Fla. Stat., the question then occurs whether the union, acting as the bargaining agent on behalf of the employee, could agree to that which the employee himself could not agree. The answer is no. Collective bargaining cannot vary statutory rights. See *Barrentine*

v. Arkansas-Best Freight System, Inc., 450 U.S. 728, 67 L. Ed. 641, 101 S. Ct. 1437 (1981). A labor union may not agree to less benefits than that provided for by statute. Ibid. While we cannot question such a rule, we can see the reason for it. For otherwise the employer could commit all kinds of illegal acts on its employees: discrimination, unlawful hours, unlawful wages, unlawful working conditions, unlawful health benefits, unlawful pensions, and simply argue when challenged in court: "The union said we could". Clearly, that is not the law and cannot be.

Since the Court in its opinion on page 5 does not specifically refer to "union contracts", but simply to contracts in a general sense between the City and its employees, then we could take that to mean the contract of the employment relationship. However, the Court states: "To hold the City liable for past offsets would effectively

modify completed contracts without affording the City an opportunity to renegotiate the other terms of those contracts, such as salaries and benefits". If that reasoning is legally correct, then no employee could ever collect from an employer for illegal wages, illegal working conditions, illegal health coverage, illegal pensions, or illegal workers' compensation because that would always be true. The employer could point to the *Bell* case and say that the illegal portion of the contract cannot be held against him because he is unable to "renegotiate" the other parts. Since that statement would always be true, the language of the decision strips §440.21(1), Fla. Stat., and §440.21(2), Fla. Stat., of any meaning. The Legislature says illegal agreements are void. This Court says they are enforceable.

Was the case a balancing of interests?[3] On the one hand, there is the employees' vested property right to receive their pensions in the manner and in the amount required by state law. On the other hand, there is the City's claim that it should be permitted to offset from 1973 to 1989, even though such offset was illegal, because it would be a hardship for the City to make restitution for the money previously, and illegally withheld. The Court's reasoning for accepting the City's claim is: "Holding the City liable for past offsets would require a reallocation of municipal services and subject today's taxpayers to yesterday's fiscal obligations." (Opinion at page 5). And in another place, the Court says: "...but to require back benefits for prior years would be fiscally unjust to the taxpayers of the City of Miami". (Opinion at page 5).

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[3] All of the Respondents are permanently totally disabled, which certainly qualifies them for the designation "physically handicapped". Art. I, §2, Fla. Const. does not permit any "balancing" of their interest versus the City's finances.

Again, the Court may have overlooked that in regard to this point, the Respondents were not afforded procedural due process of law. The City did not raise this point at the trial level, nor in the District Court below. The record contains no testimony and no documents that would support such a contention. It was not raised as a defense below. The Respondents were not afforded any opportunity to oppose it. This Court has now found as fact that it would be a financial hardship for the taxpayers of the City to make restitution for the past offsets illegally taken, which the Court described as "yesterday's fiscal obligations". (Opinion at page 5). This, too, is neither factually nor legally correct, and is an exceedingly dangerous precedent.

The Court may have overlooked that the Third District Court of Appeal had already decided in 1981 in the case of *City of Miami v. Gates,* 393 So. 2d. 586 (Fla. 3rd

DCA 1981), that the City of Miami had "taken" money from the employees' pension trust fund to pay workers' compensation by means of this offset. Anyone who can read *Gates* in the Southern Reporter knows that the City of Miami did this beginning in 1973, and that the City was found guilty and was liable to put the money back. What this means is that the taxpayers of 1973 and 1974 and 1975, 1976, 1977, and so on, got a tax break they were not entitled to, because the City paid for governmental expenses and services, etc., by taking money from the employees' pension trust fund.

This case is about restitution for money that was taken from a trust because the Respondents also had a vested property right in their workers' compensation benefits. *Florida Forest & Park Service v. Strickland,* 154 Fla. 472, 18 So. 2d 251 (1944), as well as a vested property right in their pensions, that both should be paid according

to law. *Florida Sheriffs Association v. Department of Administration*, supra.

The Court has introduced a new idea, which has no basis in the record, which is that a party should not be required to make restitution for money previously taken illegally if it would be a hardship to the party to make such restitution now. Does such a question involve a balancing of harm? The Court may have overlooked that it is only looking at the financial harm to the City and is overlooking the harm previously done to the Respondents, the firefighters and police officers and City employees, who were totally disabled in the line of duty and who had not received what the Legislature decreed in 1973 by the repeal of §440.09(4), Fla. Stat., that they should have received. They were the victims of the City's "taking" money from their trust fund described by the Third District Court of Appeal in *City of Miami v. Gates*, supra.

The Court may have overlooked that the Florida Workers' Compensation Law provides in §440.02(14), Fla. Stat., that sovereign immunity is completely waived in regard to workers' compensation. This particular provision has been in the Workers' Compensation Law since 1935 in §440.02, Fla. Stat., with various sub-section numbers, but the statute has always provided that public employment is the same as private employment.

Therefore, the reference to requiring the "taxpayers of the City of Miami" to bear the financial burden of paying what the taxpayers of previous years should have paid, is absolutely contrary to the waiver of sovereign immunity. The Court should follow the directives of the Legislature. As the Legislature has waived sovereign immunity completely in regard to workers' compensation, it would be inappropriate for the Court to interject it. For example, if this

were a private employer, could we then say: it would be unfair to the present stockholders that they should have to bear the financial burden of paying what the previous stockholders should have paid when the corporation had previously and illegally withheld money? Obviously not; yet private employers and public employers are the same. *Barragan v. City of Miami*, supra, at 254. By the same token, anyone who reads the decision could come to the conclusion that the Court is of the view that if municipal government has withheld money or taken money illegally in the past, it should be excused from having to make restitution because today's taxpayers would have to make good for what past taxpayers (maybe even some of the same taxpayers) may have illegally enjoyed.

The Court's reasoning is: "...to require back benefits for prior years would be fiscally unjust to the taxpayers of the City of

Miami". (Opinion at page 5). The Court may have overlooked that this statement will cause tremendous financial mischief. First of all, the Court may have overlooked that there are many other cities in Florida, most all of which have pension systems, particularly for firefighters under Chapter 175 of the Florida Statutes, or for police officers under Chapter 185 of the Florida Statutes. [The state of Florida and the counties of Florida are unaffected by these offset cases because they are all covered by the Florida Retirement System, which stopped offsetting with the repeal of §440.09, Fla. Stat., in 1973.] E. g. *Dept. of Hy. Safety & Motor Vehicles v. McBride*, 420 So. 2d 897 (Fla. 1st DCA 1982).

Many other cities in Florida fall into two categories: those that noticed repeal in 1973 and stopped offsetting at that time, and those that did not, but after *Barragan*, paid their retirees in accordance with the

Barragan decision both retrospectively and prospectively.[4] Depending upon the circumstances involved, some of those payments may have come from pension funds, some may have been made by workers' compensation, self insured or by insurance, and may have been paid administratively and voluntarily, or by order. The Court may have overlooked that it cannot suppose by the way the decision is written that this special privilege, not to have to pay for offsets that were illegally taken between 1973 and 1989, is a privilege to be enjoyed only by the City of Miami. Like the ancient joke of the waiter who tells the customer not to complain about the fly in the soup "because everyone else will want one", the Court should not overlook that this decision will wreck great mischief between the many other cities of Florida, their

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[4] Daytona Beach is an example. *City of Daytona Beach v. Amsel*, 585 So. 2d 1044 (Fla. 1st DCA 1991).

retired disabled employees, and their pension trust funds, for others will claim the same privilege.

The Court may have overlooked that this case is not decided in a vacuum and that there are others [the League of Cities has appeared before this Court many times]. There is nothing in the decision that confines this extraordinary privilege to the City of Miami, and yet, if nothing else, how do we handle the problem of those who have already paid? The Court may have overlooked that it cannot just forget about that. First of all, for those who were paid in workers' compensation, there is authority for the proposition that such payments could be a credit against future payments. *Belam Florida Corp. v. Dardy*, 397 So. 2d 756 (Fla. 1st DCA 1981). Where payments have been made from pension trust funds, claims may be made for "repayment". The Court may have overlooked that the precedential

harm of this decision to the pensions funds and the cities and the disabled retirees of all of the other Florida cities is considerable.

The Court offers a reason for permitting the City not to have to pay what the Court held in *Barragan* was illegally offset between 1973 and 1989. The Court allowed the City "off the hook", but only for a period of time, on the basis that it would be fiscally irresponsible to the taxpayers of the City of Miami to require payment.[5] The Court may have overlooked that it is fiscally irresponsible to the other cities in Florida, as well as to the counties and to the State, and even to the City of Miami, itself, to do so.

The Court says on page 5 that "to require back benefits for prior years would be fiscally unjust to the taxpayers or the City of Miami." What does this mean?

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[5] The Supreme Court of the United States rejects costs-savings alone as a justification for classifications. *Shapiro v. Thompson*, 394 U. S. 618, 22 L. Ed. 2d 600, 89 S. Ct. 1322 (1969).

"Fiscally unjust to the taxpayers" is defined two paragraphs before that. The Court says on page 5 that it means whatever would "subject today's taxpayers to yesterday's fiscal obligations." Thereby the Court acknowledges a fiscal obligation and defines "unjust" as holding today's taxpayers liable to pay yesterday's fiscal obligations.

The Court may have overlooked that it defined "an unjust result" to be: requiring the taxpayers of a municipality to pay outstanding fiscal obligations. This cannot be. It makes Florida look like an unstable government that repudiates fiscal obligations.

For such repudiation, there is no lawsuit and no appeal. The banks in Amsterdam and Hong Kong and London and New York loan money to Florida, the state, the counties and the cities. This Court acknowledged that there was a legal obligation to pay without offset between 1973

and 1989 (what the Court called "yesterday's fiscal obligations"), but it absolved the City of Miami of the debt because the Court says it would be a hardship for today's taxpayers to pay it. The decision is a message to the banks that if a city or a county or even the state itself have an obligation, and at a later time they claim it would be a hardship to pay that obligation, the Supreme Court of Florida will absolve the debt. The banks have a remedy for this. They raise the interest that they charge Florida government for bonds. The claim of the City that it would be a hardship to pay is fiscally irresponsible. The Court may have overlooked that it is fiscally irresponsible to recognize it and far more so fiscally irresponsible to absolve the obligation.

In the opinion, the Court states that the City of Miami followed its own ordinance in reducing disability payments equal to the amount of workers'

compensation benefits from 1973 until the date *Barragan* was decided. (Opinion at page 2-3). The Court may have overlooked that since no one testified for the City at the trial, and no documents were introduced on this point, that the Court has made a finding of fact why the City did something without any basis in the record. This denies the Respondents procedural due process of law because had the City made such defense at the trial, the Respondents would have had the opportunity to rebut it. Since the City did not present evidence on this point, the Respondents have been denied a fair hearing. More importantly, a city cannot rely on its own ordinance to do an act which is illegal under state statute, for that would amount to a city giving itself permission to violate general state law. That would be impossible. Yet the Court's statement that the City relied upon its own ordinance (Opinion at page 5) in taking these illegal

offsets, indicates that a city can give itself permission to violate general state law. For after all, the holding of the case is that the City is now allowed by the Court to violate general state law from 1973 to 1989 in this regard.

In the opinion, this Court states that the Third District Court of Appeal upheld this practice in *Hoffkins v. City of Miami.* (Opinion at page 5). The Court may have overlooked that the Respondents furnished the Court with a copy of the order in *Hoffkins v. City of Miami,* which clearly shows that Mr. Hoffkins was injured on July 10, 1972, which was one year before repeal. (Bell A. 2, 7). Since the City was a party to the *Hoffkins* case, it could not possibly have relied upon *Hoffkins* to offset any of the Respondents who were all injured after repeal.

The Court may have overlooked that in saying that *Martinez v. Scanlan,* 582 So. 2d

1167 (Fla. 1991), was prospective only (Opinion at page 5) that the Court subsequently decided in *Garcia vs. Carmar Structural, Inc.*, 18 FLW S590 (November 10, 1993), that this was of no practical effect. Although *Martinez v. Scanlan*, supra, declared the 1990 Workers' Compensation Law unconstitutional for violation of the single subject matter requirement, the Legislature had re-adopted the statute separately prior to the decision.

§440.09(4), Fla. Stat., was repealed in 1973. The Court's decision in the *Bell* case imposes this repealed statute on the Respondents even though they were injured after repeal. The Court may have overlooked that this cannot possibly be due process of law. *Martinez v. Scanlan*, supra, does not authorize the Court to impose a repealed statute on anyone, retrospectively or prospectively. This is also true of the Court's citation to *National Distributing Co.*

v. Office of Comptroller, 523 So. 2d 156 (Fla. 1988), which involves the question of whether tax refunds on account of an unconstitutional statute should be prospective only. A taxpayer does not have a vested property right in a refund; whereas a pensioner has a vested property right in his pension. Nothing in *National Distributing Co. v. Office of Comptroller*, supra, would authorize absolving the City of "yesterday's fiscal obligations" (Opinion at page 5), because it would be "fiscally unjust to the taxpayers of the City of Miami". (Opinion at page 5).

The Court relies upon *Florida Forrest & Park Service v. Strickland*, 154 Fla. 472, 18 So. 2d 251 (1944), as authority for prospective only application. However, the Court may have overlooked that in *Brackenridge v. Ametek, Inc.*, 517 So. 2d 667 (Fla. 1987; appeal dismissed; cert. denied, 488 U. S. 801, 102 L. Ed., 2d 9, 109 S. Ct. 30

(1988), the rule of *Florida Forrest & Park Service v. Strickland* was qualified in that it is only available to the party who could establish by real evidence that he had relied to his detriment upon an overruled Supreme Court case and nothing else. In the present case, the City presented no testimony and no documents that it had relied on any overruled case. Indeed, that would have been chronologically impossible since *Gates v. City of Miami*, supra, held that the City began offsetting in 1973, after repeal, by deducting the employees' workers' compensation from their pensions and then taking money from the pension fund to pay the City in an equal amount (so that all payments came from the pension trust fund and the City paid no workers' compensation at all). This was three years before *Hoffkins v. City of Miami* was decided in 1976, so the City could not have relied upon *Hoffkins* when it began offsetting in 1973, after

repeal. Furthermore, Mr. Hoffkins was injured before repeal and so his case could not be relied upon for offsetting the Respondents who were injured after repeal.

In its opinion, the Court said: "We must now decide whether *Barragan* is to be applied prospective only." (Opinion at page 4). The Court may have overlooked the rule of *Florida Forrest & Park Service v. Strickland*, supra, and *Brackenridge v. Ametek, Inc.*, supra, which holds that a decision operates both prospectively and retrospectively unless the Court decides otherwise at the time the decision is rendered. The decision in *Bell* suggests just the opposite: that after a case is decided, a party may disregard the decision and come back to the court to ask whether it should be applied retrospectively or prospectively only.

The Court may have overlooked that the City of Miami on rehearing in the *Barragan* case asked the Court to make the

decision prospective only. (Bell R. 58, 63-64, 90).

In its motion for rehearing in *City of Miami v. Barragan*, supra, the City of Miami used peculiar advocacy. It argued that the decision affected other people and that the City did not understand the decision. The City threatened to file a suit for declaratory judgment if this Court did not grant rehearing. (Bell R. 58, 63-64, 90). The City attached that proposed complaint as an exhibit as part of its motion for rehearing. In it, the City argued:

> THE CITY contends... that *Barragan* should have prospective effect only. (Bell R. 90).

The Supreme Court of Florida denied this Motion for Rehearing filed by the City. (Bell R. 92).

This Court acknowledges in the *Bell* case that the award below, which was exactly the same as the award in the *Barragan* and *Giordano* cases, is

"yesterday's fiscal obligations". (Opinion at page 5). The Court may have overlooked that having recognized the obligation of the City to pay, the opinion plainly states that the City is absolved of any payment between 1973 and 1989 to a handful of people, such as the 11 Respondents, even though it was illegal for the City not to have made payment. The reason offered by the Court for this extraordinary privilege is "...to require back benefits for prior years would be fiscally unjust to the taxpayers of the City of Miami." (Opinion at page 5). The Court may have overlooked that such decision has no factual or legal basis and is a very dangerous precedent.

In summary, the Court explains its holding on two bases. The first one is that on page 5 the Court says that the City's contracts with its employees recognized the City's right to an offset. However, in footnote 1 on page 2, the Court states that

such agreements are illegal under §440.21(1), Fla. Stat. Indeed that was part of the holding of *Barragan v. City of Miami*, 545 So. 2d 252 (Fla. 1989). This is a point which the Court recognized by holding that the City does owe after July 14, 1989. It is confusing and inappropriate for the Court to say in its opinion that it is enforcing an illegal agreement which it recognizes is an illegal agreement, but only for a period of time. The second reason offered by the Court is that it would be a hardship on today's taxpayers to have to pay for yesterday's fiscal obligations. That reasoning has no basis in law or in fact and is very dangerous. It is a repudiation of debts, which is not permitted under due process of law guarantees. We cannot say of the government that it owes money at a particular point in time and then later repudiate the debt on the basis that it would

be a hardship on the taxpayers to make payment.

There is no legal or factual basis for either of these explanations and both of them are dangerous precedents.

WHEREFORE, the Respondents request the Court to grant rehearing by withdrawing the opinion of March 3, 1994, and reconsidering the case, and granting such other relief as to the Court seems proper, including re-briefing or re-arguing or affirming or modifying the decision below, or remanding the cause to the trial judge to determine the factual issues and questions posed by the Court.

RICHARD A. SICKING, ESQUIRE
Richard A. Sicking, P.A.
Attorney for Respondents, Bell, Meyer, Fair, Hickey, Leibnitzer, King, Paredes and Daugherty
2700 S. W. Third Avenue, Suite 1E
Miami, Florida 33129
Telephone (305) 858-9181
Florida Bar No. 073747

MARK L. ZIENTZ, ESQUIRE
Williams & Zientz
Attorney for Respondents, Arostegui and Thomas
9130 S. Dadeland Boulevard, Suite 1100
Miami, Florida 33156
Telephone: (305) 670-1100
Florida Bar No. 150168

PAUL KNESKI, ESQUIRE
Kneski & Kneski
Attorney for Respondent, McLean
19 West Flagler Street, Suite 807
Miami, Florida 33030
Telephone: (305) 358-0080
Florida Bar No. 260770

Certificate of Service

I certify that a copy of the foregoing has been furnished by mail this 18th day of March, 1994, to Kathryn S. Pecko, Assistant City Attorney, City of Miami, Attorney for Petitioner, 300 Dupont Plaza Center, 300

Biscayne Boulevard Way, Miami, Florida 33131; and to Arthur J. England, Jr., Esquire, Attorney for Petitioner, 1221 Brickell Avenue, Miami, Florida 33131.

By:_____
Richard A. Sicking

SUPREME COURT OF FLORIDA

CITY OF MIAMI, Petitioner,
vs. No. 80,524
RONALD BELL, Respondent.

CITY OF MIAMI, Petitioner,
vs. No. 80,560
FRANK AROSTEGUI, Respondent.

CITY OF MIAMI, Petitioner,
vs. No. 80,575
RICHARD McLEAN, Respondent.

CITY OF MIAMI, Petitioner,
vs. No. 80,652
GEORGE A. MEYER, Respondent.

CITY OF MIAMI, Petitioner,
vs. No. 80,683
ROBERT THOMAS, Respondent.

CITY OF MIAMI, Petitioner,
vs. No. 80,728
ROBERT FAIR, Respondent.

CITY OF MIAMI, Petitioner,
vs. No. 80,981
JOHN HICKEY, Respondent.

APPENDIX C

CITY OF MIAMI, Petitioner,
vs. No. 80,998
KENNETH A. LEIBNITZER, Respondent.

CITY OF MIAMI, Petitioner,
vs. No. 80,999
EDWARD J. KING, Respondent.

CITY OF MIAMI, Petitioner,
vs. No. 81,340
ORLANDO PAREDES, Respondent.

CITY OF MIAMI, Petitioner,
vs. No. 81,554
ROBERT L. DAUGHERTY, Respondent.

[March 3, 1994]

PER CURIAM.

We have for review City of Miami v. Bell, 606 So. 2d 1183 (Fla. 1st DCA 1992), in which the district court certified the following question as one of great public importance:

> IS SECTION 440.20(7) APPLICABLE UNDER THE CIRCUMSTANCES OF THIS CASE, AND IF SO, CAN THE CITY OF MIAMI, BE LEGALLY

EXCUSED FROM PAYING A PENALTY PURSUANT TO THAT SECTION ON THE AMOUNT OF PENSION OFFSET MONIES WITHHELD IN THE PAST BECAUSE THE CITY DID SO IN GOOD FAITH RELIANCE ON THE VALIDITY OF THE CITY ORDINANCE AUTHORIZING THE PENSION OFFSET IN VIEW OF THE APPELLATE DECISIONS APPROVING ITS VALIDITY?

We have jurisdiction. Art. V, §3(b)(4), Fla. Const.

A city ordinance authorized the City of Miami (City) to reduce disability pension benefits for its retired employees in an amount equal to the workers' compensation benefits they were entitled to receive for the disabling event. This Court held the ordinance invalid based upon the legislature's 1973 repeal of section 440.09(4), Florida Statutes (1971). [6] Barragan v. City of

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[6] Section 440.09(4) provided that any workers' compensation benefits payable to injured public employees should be reduced by the amount of pension benefits that were also payable. Private employers were prohibited from taking offsets for workers' compensation benefits by section 440.21, which states:

Miami, 545 So. 2d 252 (Fla. 1989). The City continued to deduct the offset until August 1, 1989.

Respondent, Ronald Bell, a Miami firefighter, was injured in a compensable accident on January 23, 1985. On September 24, 1987, Bell began drawing permanent total disability (PTD) workers' compensation benefits of $307 per week. On the same date, Bell's disability retirement pension benefits became effective. From September 24, 1987, until August 1, 1989, the City offset Bell's PTD benefits against his monthly disability retirement pension on authority of the invalid ordinance. After August 1, 1989, the

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(1) No agreement by an employee to pay any portion of premium paid by his employer to a carrier or to contribute to a benefit fund or department maintained by such employer for the purpose of providing compensation or medical services and supplies as required by this chapter shall be valid, and any employer who makes a deduction for such purpose from the pay of any employee entitled to the benefits of this chapter shall be guilty of a misdemeanor of the second degree, punishable as provided in § 775.083. (2) No agreement by an employee to waive his right to compensation under this chapter shall be valid.

City paid full PTD and pension benefits to Bell.

On July 19, 1989, Bell submitted a claim for reimbursement of his pension offsets, with interest, penalties, costs and attorneys' fees. The City filed a notice to controvert with the Division of Workers' Compensation on August 14, 1989. The Judge of Compensation Claims rejected the City's defenses and awarded Bell benefits of $307 per week for the offset portion, with interest, costs, attorney's fees and a ten-percent penalty pursuant to section 440.20, Florida Statutes (1985).[7] The First District

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[7] Section 440.20, Florida Statutes (1985), requires that workers' compensation payments made by employers are to be made when due without the claimant having to file a formal claim. Subsection 440.20(7) provides in part:

> If any installment of compensation for death or dependency benefits, disability, permanent impairment, or wage loss payable without an award is not paid within 14 days after it becomes due, as provided in subsection (2), subsection (3), or subsection (4), there shall be added to such unpaid installment a punitive penalty of an amount equal to the greater of 10 percent of the unpaid installment or $5, which shall be paid at the same time as, but in addition to, such

Court of Appeal affirmed the order and certified the above question.

The Bell case has been consolidated with ten others.[8] In each, the respondent is a City employee injured in a compensable accident between 1973 and 1989. All were awarded reimbursement for their pension offsets with interest, a ten-percent penalty,

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> installment of compensation, unless notice is filed under subsection six (6) or unless such nonpayment results from conditions over which the employer or carrier had no control.

Subsection 440.20(6) provides in part:

> If the employer or carrier initially accepts the claim but subsequently controvert the claim, it shall file with the division a notice to controvert, within 10 days after the date of initial cessation of benefits....

[8] City of Miami v. Arostegui, No. 80,560 (police officer injured November 2, 1976); City of Miami v. McLean, No. 80,575 (sanitation worker injured August 26, 1976); City of Miami v. Meyer, No. 80,652 (firefighter injured March 13, 1976); City of Miami v. Thomas, No. 80,683 (police sergeant injured November 12, 1976); City of Miami v. Fair, No. 80,728 (firefighter injured June 18, 1975); City of Miami v. Hickey, No. 80,981 (police officer injured March 19, 1977); City of Miami v. Leibnitzer, No. 80,998 (firefighter injured July 10, 1979); City of Miami v. King, No. 80,999 (firefighter injured January 10, 1975); City of Miami v. Paredes, No. 81,340 (police officer injured November 23, 1979); and City of Miami v. Daugherty, No. 81, 554 (firefighter injured March 9, 1982).

costs and attorneys' fees, and the awards were affirmed on appeal.

As noted above, this Court held in Barragan that the 1973 repeal of section 440.09(4), Florida Statutes (1971), had the effect of invalidating the City ordinance. We rejected the ordinance as contravening section 440.21, Florida Statutes (1987), which prohibits the City from deducting from the employee's income a contribution to pay workers' compensation benefits. We must now decide whether Barragan is to be applied prospectively only.

We conclude that our decision in Barragan has no effect on the amount of disability payments owed by the City to pensioners except for those payments accruing after the effective date of that decision. From 1973 until the date Barragan was decided, the City of Miami followed its ordinance in reducing disability payments by an amount equal to workers'

compensation benefits. The Third District Court of Appeal upheld this practice. Hoffkins v. City of Miami, 330 So. 2d 1145 (Fla. 3d DCA 1976). The City's budgeting for salary and benefits as well as its allocation of tax resources was made in reliance on the ordinance and existing caselaw. Holding the City liable for past offsets would require a reallocation of municipal services and subject today's taxpayers to yesterday's fiscal obligations.

The City's contracts with its employees recognized the City's right to an offset. To now hold the City liable for past offsets would effectively modify completed contracts without affording the City an opportunity to renegotiate the other terms of those contracts, such as salaries and benefits. When contractual rights are adversely affected in such a manner, we are reluctant to apply a decision retroactively. Florida Forest & Park Service v. Strickland, 154 Fla.

472, 18 So. 2d 251 (1944). We note that our rulings in Martinez v. Scanlan, 582 So. 2d 1167 (Fla. 1991), and National Distributing Co. v. Office of Comptroller, 523 So. 2d 156 (Fla. 1988), were prospective only.

To the extent the offset was taken prior to Barragan, City employees have received what their contracts called for when their rights vested. Present and future benefits required by Barragan can be adjusted without serious financial consequence for City taxpayers; but to require back benefits for prior years would be fiscally unjust to the taxpayers of the City of Miami.

Accordingly, the City must reimburse claimants for only those offsets taken after the effective date of Barrigan, i.e., July 14, 1989. The penalty provision of section 440.20, Florida Statutes (1985), is inapplicable to offsets taken prior to that date, but applicable to those taken after.

To the extent it is inconsistent with our present opinion, we quash Bell and remand for proceedings consistent with this opinion.[9]

It is so ordered.

OVERTON, McDONALD, SHAW, GRIMES, KOGAN and HARDING, JJ., concur.
BARKETT, C.J., recused.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

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[9] We quash the district court decisions in the consolidated cases, see supra note 3, and remand for proceedings consistent with this opinion.

The Cases Listed Below Are Consolidated

Case No. 80,524

Application for Review of the Decision of the District Court of Appeal - Certified Great Public Importance
First District - Case No. 91-1878

A. Quinn Jones, III, City Attorney and Kathryn Pecko, Assistant City Attorney, Miami, Florida; and Arthur J. England, Jr. and Charles M. Auslander of Greenberg, Traurig, Hoffman, Lipoff, Rosen & Quentel, P.A., Miami, Florida,

for Petitioner

Richard A. Sicking, Miami, Florida,

for Respondent

Case No. 80,560

Application for Review of the Decision of the District Court of Appeal - Certified Great Public Importance
First District - Case No. 91-675

A. Quinn Jones, III, City Attorney and Kathryn Pecko, Assistant City Attorney, Miami, Florida; and Arthur J. England, Jr. and Charles M. Auslander of Greenberg, Traurig, Hoffman, Lipoff, Rosen & Quentel, P.A., Miami, Florida,

for Petitioner

Mark L. Zientz of Williams & Zientz, Miami, Florida,

for Respondent

Case No. 80,575

Application for Review of the Decision of the District Court of Appeal - Certified Great Public Importance
First District - Case No. 91-2155

A. Quinn Jones, III, City Attorney and Kathryn Pecko, Assistant City Attorney, Miami, Florida; and Arthur J. England, Jr. and Charles M. Auslander of Greenberg, Traurig, Hoffman, Lipoff, Rosen & Quentel, P.A., Miami, Florida,

for Petitioner

Paul J. Kneski of Kneski & Kneski, Miami, Florida,

for Respondent

Case No. 80,652

Application for Review of the Decision of the District Court of Appeal - Certified Great Public Importance
First District - Case No. 91-1297

A. Quinn Jones, III, City Attorney and Kathryn Pecko, Assistant City Attorney, Miami, Florida; and Arthur J. England, Jr. and Charles M. Auslander of Greenberg, Traurig, Hoffman, Lipoff, Rosen & Quentel, P.A., Miami, Florida,

for Petitioner

Richard A. Sicking, Miami, Florida,

for Respondent

Case No. 80,683

Application for Review of the Decision of the District Court of Appeal - Certified Great Public Importance
First District - Case No. 91-1734

A. Quinn Jones, III, City Attorney and Kathryn Pecko, Assistant City Attorney, Miami, Florida; and Arthur J. England, Jr. and Charles M. Auslander of Greenberg, Traurig, Hoffman, Lipoff, Rosen & Quentel, P.A., Miami, Florida,

for Petitioner

Mark L. Zientz of Williams & Zientz, Miami, Florida,

for Respondent

Case No. 80,728

Application for Review of the Decision of the District Court of Appeal - Certified Great Public Importance
First District - Case No. 91-1334

A. Quinn Jones, III, City Attorney and Kathryn Pecko, Assistant City Attorney, Miami, Florida; and Arthur J. England, Jr. and Charles M. Auslander of Greenberg, Traurig, Hoffman, Lipoff, Rosen & Quentel, P.A., Miami, Florida,

for Petitioner

Richard A. Sicking, Miami, Florida,

for Respondent

Case No. 80,981

Application for Review of the Decision of the District Court of Appeal - Certified Great Public Importance
First District - Case No. 91-4025

A. Quinn Jones, III, City Attorney and Kathryn Pecko, Assistant City Attorney, Miami, Florida; and Arthur J. England, Jr. and Charles M. Auslander of Greenberg, Traurig, Hoffman, Lipoff, Rosen & Quentel, P.A., Miami, Florida,

for Petitioner

Richard A. Sicking, Miami, Florida,

for Respondent

Case No. 80,998

Application for Review of the Decision of the District Court of Appeal - Certified Great Public Importance
First District - Case No. 92-1595

A. Quinn Jones, III, City Attorney and Kathryn Pecko, Assistant City Attorney, Miami, Florida; and Arthur J. England, Jr. and Charles M. Auslander of Greenberg, Traurig, Hoffman, Lipoff, Rosen & Quentel, P.A., Miami, Florida,

for Petitioner

Richard A. Sicking, Miami, Florida,

for Respondent

Case No. 80,999

Application for Review of the Decision of the District Court of Appeal - Certified Great Public Importance
First District - Case No. 92-1594

A. Quinn Jones, III, City Attorney and Kathryn Pecko, Assistant City Attorney, Miami, Florida; and Arthur J. England, Jr.

and Charles M. Auslander of Greenberg, Traurig, Hoffman, Lipoff, Rosen & Quentel, P.A., Miami, Florida,

for Petitioner

Richard A. Sicking, Miami, Florida,

for Respondent

Case No. 81,340

Application for Review of the Decision of the District Court of Appeal - Certified Great Public Importance
First District - Case No. 91-4150

A. Quinn Jones, III, City Attorney and Kathryn Pecko, Assistant City Attorney, Miami, Florida; and Arthur J. England, Jr. and Charles M. Auslander of Greenberg, Traurig, Hoffman, Lipoff, Rosen & Quentel, P.A., Miami, Florida,

for Petitioner

Richard A. Sicking, Miami, Florida,

for Respondent

Case No. 81-554

Application for Review of the Decision of the District Court of Appeal - Certified Great Public Importance

First District - Case No. 92-1593

A. Quinn Jones, III, City Attorney and Kathryn Pecko, Assistant City Attorney, Miami, Florida; and Arthur J. England, Jr. and Charles M. Auslander of Greenberg, Traurig, Hoffman, Lipoff, Rosen & Quentel, P.A., Miami, Florida,

for Petitioner

Richard A. Sicking, Miami, Florida,

for Respondent

DISTRICT COURT OF APPEAL OF
FLORIDA
FIRST DISTRICT

No. 91-1878

CITY OF MIAMI, :

Appellant, :

v. :

RONALD V. BELL, :

Appellee. :

_____:

Upon consideration of the City's motion for rehearing, the original opinion filed in this case is withdrawn and the following opinion is substituted therefor. In light of the revisions in this substituted opinion, the motion for rehearing is denied.

This is another of the many workers' compensation appeals by the City of Miami arising out of the supreme court's decision in *Barragan v. City of Miami*, 545 So. 2d 252 (Fla. 1989). This appeal questions the retroactive application of that decision,

whether the claim for past benefits offset in violation of state law is barred by the doctrine of res judicata, whether the award of a 10% penalty is error, and in what manner the *Barragan* offset of combined workers' compensation and disability pension benefits in excess of claimant's average monthly wage is to be accomplished. Finding no error in any of these respects, we affirm the appealed order.

In January 1985, Ronald Bell, a firefighter employed by the City, was injured in a compensable accident. After a period of temporary disability, he began drawing permanent total disability (PTD) compensation benefits on September 24, 1987, the same date that his service-connected disability retirement pension benefits also became effective. From that date until August 1, 1989, the City offset Bell's PTD benefits in the amount of

$1,330.03 per month against his disability retirement monthly pension benefit of $2,594.83 on the authority of the City of Miami ordinance held invalid in *Barragan*.[1] As a result, the maximum combined benefits paid to Bell during that period never exceeded his monthly pension amount and, of course, never reached his average weekly wage of $809.67 ($3481.58 monthly). Effective August 1, 1989, shortly after the supreme court had denied rehearing in its *Barragan* decision on July 14, 1989, the City ceased taking this offset and began paying Bell his full PTD benefits of $1,320.10 plus full pension benefits of $2,594.83 monthly. The City did not give retroactive effect to the *Barragan* decision and thus did not pay any past offset benefits.

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[1] The order determined that the PTD figure of $1,330.03 was excessive and that the correct monthly amount should have been $1,320.10, but this is not an issue on appeal.

On July 24, 1989, Bell filed a claim for the withheld benefits under the *Barragan* decision. On August 14, 1989, the City filed its notice to controvert[2] Bell's recently filed claim on the ground that claimant had been paid all benefits due. In view of the City's action terminating the offset as of August 1, 1989, its notice to controvert must be construed as implicitly rejecting any retroactive application of the *Barragan* decision. After the hearing, the judge of compensation claims ordered the City to pay the full amount of past benefits due under the *Barragan* decision from September 24, 1987, through August 1, 1989, and awarded a 10% penalty pursuant to section 440.20, Florida Statutes (1985), based on the City's failure to controvert the claim within the 10-day period specified in sub-paragraph (6) of

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[2] Although the notice was dated August 8, 1989, it was not filed with the Division of Workers' Compensation in Tallahassee until August 14.

that section. The order recognized that the City could limit combined benefits to the amount of claimant's average weekly wage pursuant to the *Barragan* decision, resulting in a deduction of $433.35 from total monthly benefits of $3914.93, but made no provision in the order for effectuating this offset. The judge rejected the City's contention that Bell's claim was barred under the doctrine of res judicata by reason of a previously filed claim and award in 1988 for medical benefits.[3]

The City raises four points on this appeal. After hearing lengthy oral arguments by the parties and giving this case careful consideration, we affirm the order in all respects for the reasons now set forth.

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[3] In 1988, Bell filed a claim for payment of certain medical bills related to his compensable injury. After a hearing, an order was entered May 25, 1988, pursuant to a joint stipulation of the parties, requiring the City to pay the disputed medical expenses.

I.

The City's first point contends that the order errs in applying the supreme court's *Barragan* decision retroactively. The City argues that *Barragan* overruled numerous decisions of Florida intermediate appellate courts upholding the offset under the Miami ordinance after the repeal of section 440.09(4) in 1973, and that the City had detrimentally relied on these decisions during the years it had taken the offsets pursuant to the ordinance invalidated by the supreme court's "surprise" decision holding that the ordinance "flies in the face of state law". Retrospective application of *Barragan*, the City argues, will, by judicial construction, abridge and impair the rights, positions and courses of action validated by the appellate courts of this state until *Barragan* was decided by the supreme court. Further, the City argues, *Barragan* should be applied prospectively, and not

retrospectively, to avoid "inequitable results" because otherwise Bell and other similarly situated claimants will receive monies that they had no expectation they were legally entitled to receive and that they did not attempt to secure until after the supreme court "dropped" the *Barragan* bomb.

[1] We can readily understand that the *Barragan* decision has generated something of a financial crisis for the City, and we are not entirely unsympathetic to the City's impassioned plea for relief. However, we find no valid legal basis to support the City's arguments against the retroactive application of the *Barragan* decision, this court having previously decided this point to the contrary in *City of Miami v. Burnett,* 596 So. 2d 478 (Fla. 1st DCA 1992). In that case we followed our decision in *City of Daytona Beach v. Amsel,* 585 So. 2d 1044 (Fla. 1st DCA 1991), which

held that *Barragan* is to be retroactively applied to compensable injuries occurring after the July 1, 1973, repeal of section 440.09(4).[4]

II.

The City's second point contends that it was error to rule that Bell's claim for the offset was not barred as being mature when the earlier claim for medical benefits was filed in 1988. The City points out that section 440.09(4), which had authorized the offset, was repealed in 1973, so that Bell's claim for past monies withheld pursuant to the City's offset was mature at the time of the 1988 proceeding on Bell's claim for medical benefits and thus should have been asserted in the claim for medical benefits to avoid an improper "splitting" of claims. Since the offset claim was not filed at that

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[4] This case is to be distinguished from those cases involving compensable injuries that occurred prior to the repeal of section 440.09(4) in 1973. E.g., *City of Miami v. Jones*, 593 So. 2d 544 (Fla. 1st DCA 1992).

time, the City argues, it is now barred by the doctrine of res judicata.

There is no merit in this argument. In *Wagner v. Baron*, 64 So. 2d 267 (Fla. 1953), the supreme court held:

> The cases are legion which hold that res judicata is not a defense in a subsequent action *where the law under which the first judgment was obtained is different than that applicable to the second action, or there has been an intervening decision, or a change in the law between the first and second judgment, creating an altered situation.* [Citations omitted.]
>
> "The doctrine of res judicata as to the finality of the judgment and the doctrine of law of the case as to the binding effect of interlocutory orders in litigation are rules of convenience 'designed to prevent repetitious law suits over matters which have once been decided and which have remained substantially static, factually and legally (and must give way where there has been a change in the fundamental controlling legal principles). *It is not meant to create vested rights in decisions that have become obsolete or erroneous with time.*'" [Citations omitted.]

64 So. 2d at 267-68 (emphasis added). In *Hialeah Race Course, Inc. v. Gulfstream Park Racing Association*, 210 So. 2d 750, 753-54 (Fla. 4th DCA 1968), the court explained that the doctrine of res judicata extends only to legal rights and relations of the parties as fixed by the facts determined by that judgment; when other facts or conditions intervene before the second suit, furnishing a new basis for the claims and defenses of the respective parties, the issues are no longer the same and the former judgment cannot be pleaded in bar of the second action.

[2] Because the supreme court's *Barragan* decision changed the applicable law from that previously announced in the intermediate appellate court decisions, Bell's claim is governed by the exception to the bar of res judicata recognized in the above-cited decisions. The City had accepted Bell as PTD in 1987 and was paying him full

PTD compensation benefits, although taking an offset in the amount of such benefits against his disability pension benefits in accordance with the intermediate appellate court decisions then validating that course of action. As noted by the supreme court in *Barragan*, under the case law existing at the time this claim was filed, several appellate opinions had upheld the City's right to take the offset under the Miami pension ordinance even though section 440.09(4) had been repealed in 1973. Bell's claim for medical benefits awarded in the order of May 25, 1988, did not include any claim for compensation benefits; that order did not purport to adjudicate in any manner Bell's future right to PTD compensation benefits without offset should the law change. Obviously, after the City began taking the offset in 1987, Bell could have made a claim that the City's ordinance was unconstitutional, as Barragan had done.

But Bell was not obliged to do so in order to prevent the doctrine of res judicata from barring a future claim in the event the governing law should change, so long as such claim was not otherwise barred by applicable statutes of limitation, which it was not in this instance.

III.

[3] The City's third point contends that it was error to award a 10% penalty under section 440.20, Florida Statutes (1985),[5] on the retroactively awarded setoff benefits. The appealed order recites in respect to this award:

> The claimant is entitled to a penalty of 10% on all benefits awarded by this order. See *Brazil v. School Board of Alachua County*, 408 So. 2d 842 (Fla. 1st DCA 1982). Claim was filed July 19, 1989. The City certainly knew of the claimant's entitlement on July 14, 1987 [sic],

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[5] The pertinent provisions of section 440.20 had not been significantly changed between 1985, the year in which Bell sustained his compensable injury, and 1990, when this matter came on for hearing.

> when the Supreme Court denied rehearing in *Barragan*, but they did not pay nor did they file a notice to controvert. The notice to controvert dated August 8, 1989, was not timely. The City has not shown that the failure to pay or to file a timely notice to controvert was beyond its control. §440.20(7), Fla. Stat. (1984).

We find no error in this ruling and hold that the 10% penalty was correctly awarded under the particular circumstances of this case.

Section 440.20, entitled "Payment of compensation," makes the Florida Workers' Compensation statute self-executing by requiring that payments by the employer or carrier are to be made when due without the claimant having to file a formal claim pursuant to section 440.19. Section 440.20 sets the time when payment of compensation benefits is due under various circumstances. One of the enforcing elements of this self-executing procedure is the requirement to add a penalty to the

award of benefits, with certain exceptions, whenever the employer or carrier has failed to make payments of benefits when due. Subsection 440.20(2) states that payment of benefits for total disability is due within 14 days after the employer *has knowledge* of the injury giving rise to the claimant's right to benefits. Subsection 440.20(4) states that wage loss benefits shall be paid "within 14 days of the date upon which the carrier or employer has knowledge of the compensable wage loss." Subsection 440.20(7), Florida Statutes (1985), provides in pertinent part:

> *If any installment of compensation* for death or dependency benefits, disability, permanent impairment, or wage loss payable without an award *is not paid within 14 days after it becomes due, as provided in subsection (2), subsection (3), or subsection (4),* there shall be added to such unpaid installment a punitive penalty of an amount equal to the greater of 10 percent of the unpaid installment or $5, which *shall be paid* at the same time as, but in addition to, such installment

> of compensation, *unless notice is filed under subsection (6) or unless such nonpayment results from conditions over which the employer or carrier had no control....*

(Emphasis Added).

[4,5] This statutory language is clear and unambiguous. The subsection plainly states that, as a consequence of an employer's failure to pay compensation benefits when due (i.e., within 14 days after the employer gains knowledge of facts that require payment of PTD benefits under chapter 440), "there *shall* be added to such unpaid installment a punitive penalty" of 10%. The use of the word "shall" in this context is mandatory in meaning. *See Sigg v. Sears, Roebuck & Co.*, 594 So. 2d 329 n. 1 (Fla. 1st DCA 1992); *City of Miami v. Watkins*, 579 So. 2d 759 (Fla. 1st DCA 1991). Payment of the statutory penalty required by subsection (7) can be excused only if a timely and appropriate notice to controvert has been filed in accordance with subsection

(6) or if the employer's nonpayment has resulted from conditions over which the employer had no control. That the employer or carrier acted in good faith in reasonably disputing liability for the claimed benefits is immaterial unless compliance with the requirements of the statutory exception is shown. The burden of proving that penalties are not due based on the exceptions in subsection (7) is on the employer or carrier. *All American Vending v. Kunzelman,* 482 So. 2d 609 (Fla. 1st DCA 1986). The City failed to carry that burden in this case.

The City accepted and had been paying Bell's claim for PTD compensation benefits. It impermissibly withheld payments under the pension offset provision subsequently held illegal in the *Barragan* case. It could well be argued that the City's failure to pay the offset benefits within 14 days after the City accepted Bell as PTD triggered the

penalty provision in subsection (7), even though the City was subsequently made aware of the invalidity of its ordinance through the supreme court's decision in the *Barragan* case. But the ruling of the judge of compensation claims below was not based on this theory, and we do not consider it necessary to pass on the validity of this theory in resolving this appeal. Rather, we look only to the City's conduct *after* the *Barragan* case became final.

We agree with the ruling of the judge of compensation claims that by the time rehearing was denied by the supreme court in *Barragan* on July 14, 1989, the decision was definitely final and the City then had indisputable knowledge that it was obligated by the provisions of chapter 440 to pay Bell's PTD and pension benefits without offset pursuant to the invalid ordinance. The *Barragan* decision contained no language stating that the declared invalidity of the

City's ordinance was not retroactive in effect, so the City also had knowledge that it was liable, or at least that it would most probably be held liable, to pay all previously offset benefits that had been withheld. *See City of Miami v. Burnett,* 596 So. 2d 478 (Fla. 1st DCA 1992); *City of Daytona Beach v. Amsel,* 585 So. 2d 1044 (Fla. 1st DCA 1991). The City's having this knowledge meant, under any construction of section 440.20, that all such benefits were due to be paid at least by July 28, 1989, that is, within 14 days after the supreme court's July 14 order.

On August 1, the City manifested recognition of its obligation to pay Bell under the *Barragan* decision when, without an award by the judge of compensation claims, it initiated payment of workers' compensation and pension benefits without the pension offset.[6] The City decided,

[6] Parenthetically, we note that even the August 1 date was past the 14-day limitation in the statute, but Bell has made no issue of this deficiency.

however, without giving notice to the claimant or the Division, that it would not pay the moneys previously withheld under the pension offset when it implemented this change on August 1. While the City was entitled to take the risk of an adverse decision on the retroactivity of the *Barragan* decision, in electing to do so the City necessarily incurred the risk of having to pay the penalty specified in subsection 440.20(7).

There is no dispute on this record that the City declined to pay past offset benefits within 14 days after they became payable pursuant to the supreme court's decision in *Barragan*. The City's failure to pay these benefits within 14 days after it had knowledge they should be paid requires assessment of the 10% penalty unless the City has shown that it is excused from such payment, either because it timely filed a

notice to controvert authorized in subsection 440.20(6) or because its failure to timely pay was due to conditions over which it had no control. This record does not support excuse on either ground.

Subsection (6) provides:

> (6) *If the employer or carrier initially controverts the right to compensation, it shall file with the division, on or before the 21st day after it has knowledge of the alleged injury or death, a notice,* in accordance with a form prescribed by the division, *stating that the right to compensation is controverted,* the name of the claimant, the name of the employer, the date of the alleged injury or death, and the grounds upon which the right to compensation is controverted, together with a written explanation setting forth in detail the reason or reasons why the claim has been controverted; and a copy of such notice shall be furnished by the carrier to the employee and employer. *If the employer or carrier initially accepts the claim but subsequently controverts the claim, it shall file with the division a notice to controvert, within 10 days after the date of initial cessation of benefits,* stating the reasons for the delayed

> controversion; and a copy of such notice shall be furnished by the carrier to the employee and employer.

(Emphasis added.) This is not a case in which the City initially controverted the claimant's right to compensation; the City had previously accepted Bell as PTD and was paying him PTD benefits. For this reason, the provisions authorizing the employer or carrier to file a notice to controvert within 21 days "after it has knowledge of the alleged injury" simply is not applicable. Neither is the 10-day notice provision in subsection (6) applicable; this is not a case where the City had been paying, but then ceased paying, disputed benefits. In any event, even if the 10-day notice provision could be considered to authorize the City to controvert liability for past compensation benefits withheld, its notice to controvert such payments, filed August 14, was not filed within 10 days (or even within

21 days) after the City had knowledge on July 14 that the disputed compensation payments were required to be paid to Bell. We recognize that the notice to controvert was filed on the 21st day after the claimant *filed* his claim on July 24, but that fact does not make it timely. The time constraints prescribed in section 440.20 setting the due dates for payment commence from the date an employer or carrier has the requisite knowledge that compensation is payable, not from the date a formal claim for benefits is filed pursuant to section 440.19. The record clearly supports the judge's finding that the City had requisite knowledge as of the July 14 date that the disputed compensation was payable to Bell.

The record also supports the finding of the judge of compensation claims that the City did not show that its failure to timely pay or timely file a notice to controvert was due to conditions beyond its control. The

City did not attempt to make any showing that its failure to timely pay was due to such conditions.

Finding no basis for error in the judge's award of the 10% penalty pursuant to subsection 440.20(7) under these circumstances, that award is affirmed.

This issue was requested to be considered by the court en banc based on the views expressed in the dissenting opinion. With one judge recused, six judges voted in favor of considering the issue en banc and six voted against en banc; thus, the case remained with the panel. In view of this close vote, we certify the following question of great public importance to the supreme court:

> IS SECTION 440.20(7) APPLICABLE UNDER THE CIRCUMSTANCES OF THIS CASE, AND IF SO, CAN THE CITY OF MIAMI, BE LEGALLY EXCUSED FROM PAYING A PENALTY PURSUANT TO THAT SECTION ON THE AMOUNT OF PENSION OFFSET MONIES

WITHHELD IN THE PAST BECAUSE THE CITY DID SO IN GOOD FAITH RELIANCE ON THE VALIDITY OF THE CITY ORDINANCE AUTHORIZING THE PENSION OFFSET IN VIEW OF THE APPELLATE DECISIONS APPROVING ITS VALIDITY?

IV.

The City's fourth point raises an interesting question regarding the implementation of the "*Barragan* offset" authorized in the final order. This offset derives solely from the supreme court's opinion in *Barragan*, wherein it directed:

> The employer may not offset workers' compensation payments against any employee's pension benefits except to the extent that the total of the two exceeds the employee's average monthly wage.

545 So. 2d at 255.[7] The order recognized this offset was appropriate in the amount of

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[7] The limitation of combined benefits to no more than "average monthly wage" in the *Barragan* opinion was derived by the supreme court from its prior opinions in *Domutz v. Southern Bell Tel. & Tel. Co.*, 339 So. 2d 636 (Fla. 1976), and *Brown v. S. S. Kresge Co.*, 305 So. 2d 191 (Fla. 1974). Both of those decisions were predicated on provisions in court-made rules governing workers' compensation proceedings that no longer appear in the current Workers'

$433.35 per month, but made no provision for giving effect to this offset in the decretal portion of the order. Because the order is silent as to how the offset is to be recouped, the City asks this court to specify that the offset be taken by the City rather than the pension fund. The claimant responds by urging that the order was not in error in failing to direct how this offset would be accomplished and, alternatively, advances the legal theory that any excess over average monthly wage should create a lien

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Compensation Rules of Procedure. Although workers' compensation law is wholly a creature of statute, unlike common law rights and remedies, there is no statutory provision in chapter 440 authorizing the limitation directed in the *Barragan* opinion. This matter was explored at length during oral argument, and the City agreed that the limitation would be applicable only to the combination of disability pension benefits and workers' compensation benefits, as that was the precise factual situation present in the *Barragan* case.

We have given effect to the "Barragan offset" in this case in the absence of statutory authority because this court is required to follow the decisions of our supreme court. However, this limitation is a matter that should be addressed by legislative enactment as soon as possible to avoid future controversies.

in favor of the pension fund to the extent of such excess.

We decline to decide this dispute. It is most significant that the supreme court in *Barragan* expressly declined to recognize any legal distinction between the City and the pension fund trustees regarding the subject matter of this litigation. The court rejected the City's argument that the pension fund was an indispensable party, saying, "After all, the city is responsible for the payment of both workers' compensation and pension benefits regardless of the funds from which these monies are withdrawn, and the city has strenuously litigated this case on behalf of its pension fund through these proceedings." 545 So. 2d at 253. We likewise decline to treat the City as a different legal entity from its pension fund. Accepting the supreme court's characterization of the City's legal responsibility for payment of both workers'

compensation and disability pension benefits as correct, it would seem that how the City gives effect to the *Barragan* offset and allocates the excess of benefits over average monthly wages is an internal municipal matter more appropriately resolved by the City alone. No legal basis exists for this court to resolve the dispute presented by the City under this point.

The appealed order is in all respects AFFIRMED.

ERVIN, J., concurs.

BOOTH, J., dissents in part with opinion.

BOOTH, Judge, dissenting in part:

I dissent from the affirmance of penalties awarded under section 440.20, Florida Statutes. The majority's efforts to fit the facts of this case under subsection (6) and, failing that, subsection (7), of section 440.20, fall short of what the law requires in applying a penalty statute. A penalty

statute must clearly state the conduct that is the basis for its application. Only in this way does the statute give notice and opportunity to avoid the proscribed conduct. The corollary of the clarity requirement is the rule that penalty statutes must be strictly construed in favor of the party sought to be penalized.[1] The rule is stated as follows:[2]

> Penalties are not favored, and should not be imposed except in cases which are clear and free from doubt. The law must be clear in order to exact penalties in civil cases.

In keeping with the above-stated clarity requirement is the rule that penalty statutes be strictly construed, viz:[3]

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1. *Philip C. Owen, Chartered v. Department of Revenue,* 597 So. 2d 380 (Fla. 1st DCA 1992); *Gardinier, Inc. v. Department of Pollution Control,* 300 So. 2d 75, 78 (Fla. 1st DCA 1974); *Turner v. Department of Professional Regulation,* 591 So. 2d 1136, 1137 (Fla. 4th DCA 1992).

2. 70 C.J.S. *Penalties* § 2 at 107 (1992).

3. *Id.* at §5 at 108-109 (1992).

> Statutory provisions for penalties must be strictly construed, and may not be extended by construction to acts which are not within the intention of the legislature to penalize. It has even been said that such provisions must not be construed to include anything beyond their letter even though within their spirit. One who seeks to recover a penalty imposed by statute must bring his case clearly with the terms of the statute.

The instant case involves the ten-percent penalty of subsections 440.20(6) and (7), a penalty imposed for delay in paying or controverting the right to compensation. In order to impose the penalty here, we must be able to say, clearly, that the pay-back of retirement benefits was "compensation." But this is not at all clear. *Barragan*,[4] citing *Jewel Tea*,[5] holds that the JCC has jurisdiction of claims to recover offsets taken in violation of section 440.21,

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4. *Barragan v. City of Miami*, 545 So. 2d 252 (Fla. 1989).

5. *Jewel Tea Company v. Florida Industrial Commission*, 235 So. 2d 289 (Fla. 1969).

regardless of whether the offsets are stated to be against workers' compensation benefits or against retirement or other benefits.

Neither *Jewel Tea* nor *Barragan* holds, however, that the restored amounts are to be treated as "compensation" under Chapter 440 or for the purposes of penalties.[6] In the instant case, the restored benefits were retirement benefits. Benefits provided under Chapter 440 have been paid.[7]

The next stumbling block to the imposition of penalties is knowing when the offset amounts claimed first became due and owing for the purpose of the time requirements of the penalty statute. This is

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6. *See City of Miami v. Arostegui*, 606 So. 2d 1192, (Fla. 1st DCA 1992), certifying the question of whether offset amount restored following *Barragan* constitutes an "installment of compensation" for purpose of imposing penalties.

7. In *State, Department of Transportation v. Davis*, 416 So. 2d 1132, 1133 (Fla. 1st DCA 1982), this court held that despite Chapter 440's providing for a social security offset [section 440.15(10), now subsection 440.15(9)], money payable under the social security laws is not "compensation."

a subject fit for debate among legal scholars and jurists, but the answer is far from clear and should, on that basis alone, preclude penalties. In this case, the penalty is calculated on amounts offset *prior* to *Barragan*'s holding that the ordinance was invalid. The offset was made pursuant to city ordinance 40-207(J). Several appellate decisions held that ordinance valid, even after the repeal in 1973 of section 440.09(4), Florida Statutes.[8]

From September 1987 to August 1989, retirement benefits were offset under *what we now know* was an invalid ordinance. Were those offset amounts "due" for penalty purposes before *Barragan* or before *Amsel*,[9] holding *Barragan* was retroactive? If

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8. *City of Miami v. Knight*, 510 So. 2d 1069 (Fla. 1st DCA), *cert. denied*, 518 So. 2d 1276 (Fla. 1987); *Hoffkins v. City of Miami*, 339 So. 2d 1145 (Fla. 3d DCA 1976), *cert. denied*, 348 So. 2d 948 (Fla. 1977).

9. *Daytona Beach v. Amsel*, 585 So. 2d 1044 (Fla. 1st DCA 1991).

appellant "should have known" the ordinance was invalid, did that make the offset amounts due? At what point did this imputed knowledge make the offset amount due? Should not appellee, who now seeks to penalize this delay, also be held to know that the ordinance would eventually be ruled invalid and therefore be required to timely give notice of a claim that included penalties under subsection (7)?[10]

The majority forgives appellee's failure to claim the offset in his 1988 claim because, under the existing law, there was no basis for such a claim. A different rule is applied to appellant, however, who must now pay the offset amounts based on the

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10. §440.20(7), Fla. Stat.:

(7) ...When any installment of compensation payable without an award has not been paid within 14 days after it became due and the claimant concludes the prosecution of the claim before a judge of compensation claims without having specifically claimed additional compensation in the nature of a penalty under this section, he will be deemed to have acknowledged that, owing to conditions over which the employer or carrier has no control, such installment could not be paid within the period prescribed for payment and to have waived his right to claim such penalty.

retroactive application of a change in the law and pay a penalty to boot. Where was appellant's opportunity to avoid the penalty? What was the effect of the ordinance remaining on the books that authorized the offset?

The fact that these questions can be raised now by those of us having knowledge of the facts and changes in the law, shows that the penalty of subsections 440.20(6) and (7) does not "fit" here and should not be imposed. The statute should not be used to penalize conduct after-the-fact based on amounts that become due because of a change in the law.

Despite the confusion of the majority's opinion, the net result of that opinion is clear: appellant could only have avoided this penalty by complying with *Barragan* in 1987, two years before the case was decided.

Not surprisingly, the majority cites no authority for the proposition that a party

can be subject to penalties for failing to anticipate the holding of a case. Only a soothsayer with a crystal ball could have predicted in 1985, when the original claim arose, or in 1987, when the offsetting began, that *Barragan* would be decided (July 1989) and, eventually (October 1991), be held to apply retroactively. Yet the JCC ruled that appellant's failure to file a notice to controvert within ten days after the denial of rehearing in *Barragan* subjected it to a ten-percent penalty. Why the denial of rehearing in that case should fit either as an "initial cessation" of benefits under subsection (6), or as the date an "installment of compensation... becomes due" under subsection (7), as held by the majority, is not explained. In fact, the statute provides no point in time for filing a notice to controvert under these facts.

There is only one provision that fits, viz: the provision that the penalty is

inapplicable where "nonpayment results from conditions over which the employer or carrier had no control." Cases construe that provision to prevent the imposition of the penalty where the employer has a valid excuse,[11] and to require a finding of fault.[12] For this reason, in addition to the other basis of section 440.20 inapplicability, the penalty award should be reversed. In all other respects, I concur in the opinion.

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11. *Four Quarters Habitat, Inc. v. Miller*, 405 So. 2d 475 (Fla. 1st DCA 1981):

> [T]he DC should not impose a penalty if the employer has a legitimate excuse for not controverting.

Compare King v. Lord Colony Enterprises, 400 So. 2d 856, 857 (Fla. 1st DCA 1981), wherein employer offered no excuse for delay in determining correct compensation rate.

12. *Florida Community Health Center v. Ross*, 590 So. 2d 1037, 1039 (Fla. 1st DCA 1991):

> In the case of penalties, section 440.20(7) awards penalties against the employer or carrier *depending upon fault*. Further, the order awarding such penalties should contain sufficient findings of fact and conclusions of law supporting their imposition. *Jupiter Marine v. Spoelstra*, 528 So. 2d 1270 (Fla. 1st DCA 1988). [emphasis added]

STATE OF FLORIDA
DEPARTMENT OF LABOR &
EMPLOYMENT SECURITY
OFFICE OF JUDGE OF COMPENSATION
CLAIMS
DISTRICT " K "

Claim No.: 264-64-7265
Date of Accident: 1/23/85

RONALD V. BELL, :

Employee, : :

v. :

CITY OF MIAMI, :

Employer/Self Insured. :

_____:

Richard A. Sicking, Attorney for Employee;

Ramon Irizarri, Assistant City Attorney, Attorney for Employer/Self Insured

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ORDER

THIS CAUSE came before me for hearing after due notice to the parties, and after considering all of the evidence I find:

(1) The Judge of Compensation Claims has jurisdiction of the parties and the subject matter.

(2) The claim was for the payment of compensation at the rate of $307.00 per week from September 24, 1987, through August 1, 1989, for permanent total disability, which the City acknowledged, but which payment was offset against a service-connected disability pension. This claim was made pursuant to the Supreme Court of Florida's decision in *Barragan v. City of Miami,* 545 So. 2d 252 (Fla. 1989). Claim was also made for penalties, interest, costs and attorney's fees, including bad faith as a basis.

(3) The City defended on the grounds of a general denial and no jurisdiction. The City contended that the claimant knew the claim was mature and failed to interpose it, i. e., splitting a cause of action. The City contended that *Barragan* is not applicable. The City contended that the claim is barred

by the statute of limitation and laches. The City contended that the claim is barred by *Gates v. City of Miami*..

(4) The parties stipulated and agreed that the claimant suffered a compensable accident on January 23, 1985; that he had an average weekly wage of $809.67 with a corresponding average monthly wage of $3,481.58, and a maximum weekly compensation rate of $307.00 per week, which is a monthly compensation rate of $1,320.10; that the claimant's monthly pension benefit was $2,594.83; that the claimant has been permanently totally disabled since September 24, 1987; that the pension offset started September 24, 1987, and ended August 1, 1989.

(5) The claim was filed July 19, 1989, and controverted August 8, 1989.

(6) The evidence consisted of exhibits: the pretrial stipulation, a prior pretrial stipulation and an order dated May

25, 1988, approving a stipulation in regard to the payment of medical care and a stipulation and order on attorney's fees, two excerpts from the City Code setting forth the City's workers' compensation offset, the Judge of Compensation Claims' orders in *Barragan* and *Giordano*, the City's motion for rehearing in *Barragan*, two orders in *Gates v. City of Miami*, the notice to the class in *Gates*, and a BCL-4 of August 17, 1988, accepting permanent total disability as of September 24, 1987.

(7) The claimant suffered an admittedly compensable accident on January 23, 1985, for which he has an average weekly wage of $809.67, which is an average monthly wage of $3,481.58. The claimant's average weekly wage was not at issue and not determined in any prior proceedings. The average weekly wage is now jointly stipulated.

(8) The claimant was accepted as permanently totally disabled as of September 24, 1987. The claimant received a service-connected disability retirement from the City effective September 24, 1987, which amounted to $2,594.83 per month. From that time until August 1, 1989, the City deducted $1,330.03 every month from the claimant's pension on authority of the City of Miami's offset ordinance.

(9) Beginning August 1, 1989, the City stopped taking the offset and since then has paid the claimant his service-connected disability pension amounting to $2,594.83 per month and workers' compensation amounting to $1,320.10 per month.

(10) The claimant's monthly workers' compensation rate of $1,320.10 plus his monthly service-connected disability pension of $2,594.83 totals $3,914.93 which is more than his average monthly wage of $3,481.58. Therefore, there is a "*Barragan*

offset" of $433.35 per month ($3,914.93 - $3,481.58).

(11) During the period of time that the City took the offset from September 24, 1987, to August 1, 1989, the City took the offset at what was mathematically an excessive rate. The claimant's weekly compensation rate of $307.00 x 4.3 is $1,320.10 per month. The City, however, deducted $1,330.03. The City apparently made this calculation by taking $307.00 per week and multiplying it by 52 and dividing by 12. It is, however, incorrect to project a monthly benefit in this manner, because in order for it to be correct, the claimant would have to collect beyond his last payment in order to correct the adjustment. Consequently the City deducted $9.93 too much each month, even by their own calculations. The claimant would be entitled to this adjustment in any event.

(12) The City admits that it has stopped taking the offset as of August 1, 1989.

(13) The claimant was not paid workers' compensation for permanent total disability from September 24, 1987, to August 1, 1989, at $307.00 per week, although the City admits he was entitled to such payment. The City sent the claimant workers' compensation during this period of time but he did not actually receive it, because the City took the payment away at the same time under its workers' compensation offset ordinance.

(14) This workers' compensation offset ordinance was declared unlawful by the Supreme Court of Florida in *Barragan v. City of Miami*, 545 So. 2d 252 (Fla. 1989) for two reasons: (1) the Florida Legislature has preempted the field the workers' compensation; the Florida Legislature has waived sovereign immunity completely for

the state and its political subdivisions including municipal corporations like the City of Miami; the Florida Legislature repealed statutory authorization for an offset in 1973, Laws of Florida Ch. 73-127; the Home Rule Powers Act does not authorize the City to enforce an offset ordinance after such repeal; (2) §440.21, Fla. Stat. prohibits any scheme by which the employer pays benefits from a fund to which the employee contributed; the City of Miami's workers' compensation offset is such a scheme.

(15) The pension offset declared invalid in *Barragan* is set forth in the City Code which provides for an offset for workers' compensation "against and payable in lieu of any benefits payable out of funds provided by the City under the provisions of the retirement system on account of the same disability or death".

(16) Since the claimant paid into this fund out of his bi-weekly paycheck, this is a scheme by which the employer pays benefits from a fund to which the employee himself (and the other employees) contributed. This is unlawful under §440.21, Fla. Stat. Indeed it is so unlawful that the statute provides that it is a crime, albeit a misdemeanor. Plainly the Supreme Court held that the City of Miami's workers' compensation offset was illegal and invalid.

(17) The City of Miami applied for rehearing in *Barragan* and asked that the decision not apply to other employees whose benefits were offset in the past (City's Petition for Rehearing, page 6). The Supreme Court denied rehearing.

(18) The *Barragan* case applies both retroactively and prospectively to others besides Mr. Barragan and Mr. Giordano. The Supreme Court did not specifically limit that decision to the parties, nor was it stated

to be prospective only. Therefore, the *Barragan* decision would apply to the claimant, Ronald V. Bell. See *Florida Forest and Park Service v. Strickland,* 18 So. 2d 251 (Fla. 1944).

(19) This claim of Ronald V. Bell is not splitting a cause of action.

(20) The claimant's average weekly wage and his entitlement to be paid compensation for the period of time involved and for the class of disability the City admits he has, were not at issue in the prior proceedings, which involved medical benefits only.

(21) The City had wrongfully refused to provide the claimant with medical care which was awarded in the order of May 25, 1988, approving of a stipulation. The claimant had to file claim at that time to obtain medical care. Had the City not wrongfully withheld the payment of his medical expenses, the prior litigation would

never have ensued. Since the City had wrongfully withheld his prior medical benefits, they should be estopped to complain about any effect of the prior litigation.

(22) Furthermore, *Barragan* was decided after the earlier order on medical benefits in this case and that is a superseding ground. The present case does not involve any issue requiring a determination of the nature, degree, duration or extent of the claimant's disability. It is admitted by the City that the claimant was permanently totally disabled from September 24, 1987, to August 1, 1989, and that he is entitled to workers' compensation of $307.00 per week during such period. The claimant simply was never really paid this disability.

(23) The City contends that the claim is barred by the statute of limitation. The claim is not barred by the statute of

limitation as it was clearly filed within two years of the last payment of compensation (which is currently being paid).

(24) The City has raised laches as a defense; however, I find that laches does not apply for a number of reasons. As was pointed out in the oft-cited case of *Florida Erection Services, Inc. v. McDonald*, 395 So. 2d 203 (Fla. 1st DCA 1981) and its progeny, the employer in a workers' compensation case owes the duty to the injured employee of a fiduciary to self administer the law, to see to it that the correct benefits are paid to the employee in a timely and proper fashion. This, of course, was not done in the present case. Furthermore, §440.21, Fla. Stat. provides that it is unlawful for the employer to operate a scheme by which the employee contributes to a fund from which his own benefits are paid. This is so prohibited that it is a crime, albeit a misdemeanor. The defenses of laches simply does not apply.

(25) *Gates v. City of Miami* does not bar this workers' compensation claim, nor is it limited in any way by the union contracts prior to *Gates*, nor those after. §440.21, Fla. Stat. further provides that no agreement by the employee to waive his rights under this chapter shall be valid. Since the employee cannot waive his rights under this chapter, his bargaining representative could not do so either, nor is there any indication that he or they did. The workers' compensation offset claimed here pre-dates collective bargaining and was simply carried forward. The *Gates* decree does not adjudicate the claimant's workers' compensation rights nor could it have done so since the jurisdiction over workers' compensation matters was in the judges of compensation claims. Furthermore, the exhibits show that the City raised the *Gates* decree on rehearing to the Supreme Court in the *Barragan* case,

which motion for rehearing was denied. The Circuit Judge in *Gates* has reached the same conclusion.

(26) As the claimant was not paid his admitted permanent total disability at $307.00 per week from September 24, 1987, to August 1, 1989, he is entitled to such payment from the City.

(27) The claimant is entitled to statutory interest on this award which shall be paid at the same time and in addition to this award.

(28) The claimant is entitled to a penalty of 10% on all benefits awarded by this order. See *Brazil v. School Board of Alachua County*, 408 So. 2d 842 (Fla. 1st DCA 1982). Claim was filed July 19, 1989. The City certainly knew of the claimant's entitlement on July 14, 1987, when the Supreme Court denied rehearing in *Barragan*, but they did not pay nor did they file a notice to controvert. The notice to

controvert dated August 8, 1989, was not timely. The City has not shown that the failure to pay or to file a timely notice to controvert was beyond its control. §440.20(7), Fla. Stat. (1984).

(29) The claimant is entitled to costs of these proceedings, if any, which shall be paid by the employer upon presentation. Should there be any dispute as to an item of costs, jurisdiction is hereby specifically reserved to determine such question upon application for hearing by any party.

(30) The claimant's attorney, Richard A. Sicking, is entitled to a reasonable attorney's fee pursuant to §440.34, Fla. Stat. (1984) for having obtained benefits for the claimant. Jurisdiction is reserved to determine who is responsible for payment and the amount of such fee.

WHEREFORE, it is ORDERED and ADJUDGED that the City of Miami do:

(1) Pay Ronald V. Bell permanent total disability at the rate of $307.00 per week from September 24, 1987, to August 1, 1989.

(2) Pay a penalty of 10% on all benefits awarded by this order.

(3) Pay statutory interest on all benefits awarded by this order.

(4) Pay costs as provided in this order.

IT IS FURTHER ORDERED and ADJUDGED:

(5) Jurisdiction is reserved to determine who is responsible for payment and the amount of a reasonable attorney's fee for the claimant's attorney.

DONE and ORDERED at Miami, Dade County, Florida, this 13th day of May, 1991.

/s/ Alan M. Kuker
ALAN M. KUKER
Judge of Compensation Claims

(Seal)

Certificate of Mailing

THIS IS TO CERTIFY that a copy of the foregoing Order was sent by regular mail this 13th day of May, 1991, to: Ronald V. Bell, claimant, Route 2, Box 2004, Obrien, Florida 32071-9600; Richard A. Sicking, Esquire, attorney for claimant, 2700 S. W. Third Avenue, Suite 1E, Miami, Florida 33129; City of Miami, employer/self insured, c/o Risk Management, P. O. Box 330708, Miami, Florida 33233-0708; Ramon Irizarri, Assistant City Attorney, attorney for

employer/self insured, 1100 AmeriFirst Building, One S. E. Third Avenue, Miami, Florida 33131.

/s/ Secretary
Secretary to Judge of Compensation Claims

CITY OF MIAMI, FLORIDA

INTER-OFFICE MEMORANDUM

Mr. M. L. Reese
City Manager DATE: May 10, 1973 FILE:

Attention: Mr. Joel V. Lanken, Special Assistant to City Manager Employee Services

SUBJECT: Workmen's Compensation Program Expenditures

REFERENCES:

W. R. Bailey
Director of Finance ENCLOSURES:

This is in response to the request of Joel Lanken, under date of April 20, 1973, for assistance in furnishing estimates related to Workmen's Compensation expenditures for the 1973-74 fiscal year.

To assist the Office of Employee Services in substantiating the current 1972-73 fiscal year's estimated deficit and 1973-74 Budget preparation, the following practices have been effected January, 1973.

1P3 The Workmen's Compensation payment due to retirees on disability pension were either issued a separate payment from the City's Workmen's Compensation Fund and the

gross pension issued was reduced by an equal amount of the pension check and rubber stamped to indicate that each check included the amount due as Workmen's Compensation. A separate check was not issued.

As of January 1, 1973, the procedure was changed so that all disability retirees who were to receive Workmen's Compensation received a check from the City for Workmen's Compensation bi-weekly and the equivalent amount was deducted from the retiree's monthly pension check. The total amount deducted from the pension checks as the Workmen's Compensation offset, plus the amount deducted from the retiree for advance Workmen's Compensation deductions, is to be remitted in total to the City as a reimbursement.

Under this procedure the amount to be issued annually to disability retirees as Workmen's Compensation payment will be approximately $135,000.00. The amount that was issued separately as Workmen's Compensation payment under the previous method was approximately $35,000.00 to $45,000.00.

The amount the City will receive from the Retirement System as recovery for Workmen's Compensation will be approximately $145,000.00 annually, based on present estimate this date.

1P3 & 1P4 The present procedure will increase the requirements against the 1973-1974 (104.01.4170) Workmen's Compensation code by approximately $40,000 to $100,000 annually.

Mr. M. L. Reese
City Manager

May 10, 1973

Attention: Mr. Joel V. Lanken, Special Assistant to City Manager Employee Services

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There will be a revenue recovery into the General Fund as "Reimbursement-Recovery from Retirement System on Workmen's Compensation" approximately $145,000 annually on which Revenue Forms for 1973-74 Budget Estimate reflect only one month of the indicated four (4). 1973-74 Revenue Estimates for the Account should be reported as annual estimate of $145,000.00.

WRB/p
bc: Betty Harris
Joel Lanken

AMENDMENT V, U. S. CONST.

No persons shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX G

ARTICLE XIV, U. S. CONST.

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX H

CITY OF MIAMI FIRE FIGHTERS' AND POLICE OFFICER' RETIREMENT TRUST PENSION ORDINANCE

§40-212

(N) *Pension offset by other compensation benefit.* Any periodic or lump-sum amounts which may be paid or payable under the provisions of any state workers' compensation or similar law to a member or to the dependents of a member on account of any disability or death, shall be offset against and payable in lieu of any benefits payable from funds provided by the city under the provisions of the retirement system on account of the same disability or death. (Ord. No. 10002. §1. 6-13-85)

APPENDIX I